Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 79-1618

IN THE

Supreme Court of the United States

October Term, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

JOHN H. LEDERER

JOHN DUNCAN VARDA
ANTHONY R. VARDA

DeWITT, SUNDBY, HUGGETT
& SCHUMACHER, S.C.

121 South Pinckney Street
P.O. Box 2509
Madison, Wisconsin 53701
Telephone: 608-255-8891

Attorneys for Petitioner

GUILD PRINTING MADISON, WIS.

QUESTION PRESENTED

May a court, without articulating its rationale, summarily deny an application for attorneys' fees under 42 U.S.C. §1988?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF CASE..... 3

SUMMARY OF ARGUMENT 4

ARGUMENT..... 5

I. THE SOLE ISSUE BEFORE THE COURT IS WHETHER THE LOWER COURT MUST STATE ITS REASONING..... 5

II. THIS COURT MUST REMAND TO PROTECT ITS POWER TO REVIEW.

A. The Power To Require An Opinion Is Inherent In The Power To Review 8

B. The Power To Review Is Impaired By The Lower Court's Failure To State Reasons..... 8

C. Failure To State Reasons Denies The Litigants Fairness 10

III. THE COURTS HAVE HELD THAT ATTORNEYS' FEE DECISIONS REQUIRE A STATEMENT OF REASONS.

A. Review Of Attorneys' Fee Awards Requires a Statement Of Reasons 11

B. This Court Has Held That A Court Of Appeals Must State The Reasons For Denial Of Attorneys' Fees 13

IV. REMAND TO THE CIRCUIT COURT WITH INSTRUCTION TO REMAND TO THE DISTRICT COURT IS THE APPROPRIATE RELIEF.

A. The District Court Is Better Able Than The Appellate Court To Determine Attorneys' Fees 14

B. Congress Did Not Intend The Courts Of Appeals To Initially Determine Attorneys' Fee Awards..... 15

CONCLUSION 17

CITATIONS

CASES CITED **Page**

Adams v. United States, 620 F.2d 1277 (8th Cir. 1980) *cert. denied* 101 S.C. 88 (1980)..... 15

Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146 (5th Cir. 1980)..... 15

Blackburn v. Alabama, 354 U.S. 393 (1957)..... 8

Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980)..... 15

Booker v. Brown, 619 F.2d 57 (10th Cir. 1980)..... 15

Brown v. Bathke, 566 F.2d 588 (8th Cir. 1977)..... 9, 15

Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980)..... 9, 15

Crain v. City of Mountain Home, Arkansas, 611 F.2d 726 (8th Cir. 1979)..... 15

Consolidated Freightways v. Kassel, 612 F.2d 1064 (8th Cir. 1979)..... 3

Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979)..... 15

Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978)..... 10

Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3617 (U.S. 2/24/81) (No. 80-1039)..... 15

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980)..... 15

Fitzpatrick v. Bitzer, 455 F. Supp. 1338 (D. Conn. 1978)..... 15

Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978)..... 12, 15

Gary W. v. State of Louisiana, 622 F.2d 804 (5th Cir. 1980)..... 15

Gay Lib v. University of Missouri, 588 F.2d 848 (8th Cir. 1977) *cert. denied*, 434 U.S. 1080 (1978)..... 15

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938)..... 6

Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978)..... 9, 15

Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980)..... 15

Honeyman v. Hanan, 300 U.S. 14 (1937)..... 8

International Society for Krishna Conscionsuess, Inc. v. Anderson, 569 F.2d 1027 (8th Cir. 1978) 12

Iranian Students Assoc. v. Edwards, 604 F.2d 352 (5th Cir. 1979)..... 15

Irvine v. California, 377 U.S. 426 (1964)..... 6

J. I. Case Co. v. Borak, 377 U.S. 426 (1964)..... 6

Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979)..... 15

Kassel v. Consolidated Freightways, 49 U.S.L.W. 4328..... 4

Kimbrough v. Arkansas Activities Assoc., 574 F.2d 423 (8th Cir. 1978) 9, 13

Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) 10

Love v. Mayor of Cheyenne, 620 F.2d 235 (10th Cir. 1980) 15

Mayor v. Educational Equality League, 415 U.S. 605 (1974)..... 6

McGowan v. King, Inc., 616 F2d 745 (5th Cir. 1980)..... 12

McManama v. Lukhard, 616 F 2d 727 (4th Cir. 1980) 15

Mid-Hudson Legal Services, Inc. v. G&U, Inc.,
578 F.2d 34 (2d Cir. 1978), *on remand*,
465 F. Supp. 261 (S.D.N.Y. 1978) 15

Minnesota v. National Tea Co.,
309 U.S. 551 (1940)..... 8

National Licorice Co. v. National Labor Relations Board, 309 U.S. 350 (1940)..... 6

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968)..... 12

Northcross v. Board of Education,
412 U.S. 427 (1973)..... 8, 13, 14

Northcross v. Board of Education, 611 F.2d 624
(6th Cir. 1979), *cert. denied*, 447 U.S. 911
(1980) 15

O'Neil v. City of Lake Oswego,
642 F.2d 367 (9th Cir. 1981) 12

Panama Mail Steamship Co. v. Vargas,
281 U.S. 670 (1930)..... 8

Parker v. Califano,
561 F.2d 320 (D.C. Cir. 1977), *on remand*,
443 F. Supp. 789 (D. DC 1978) 15

Perkins v. Standard Oil Co. of California,
399 U.S. 222 (1970)..... 14

Prandini v. National Tea Co.,
585 F.2d 47 (3d Cir. 1978) 15

Public Service Commission of Wisconsin v. Wisconsin Telephone Co., 289 U.S. 67 (1933) 8

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)..... 16

Sargent v. Sharp, 579 F.2d 645 (1st Cir. 1978)..... 12

Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977)..... 10, 15

Taylor v. McKeithen, 407 U.S. 191 (1972)..... 8

United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980) 9

Virginia Railroad Company v. U.S., 272 U.S. 660 (1926)..... 10

Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977) 15

White v. New Hampshire Dept of Employment Security, 629 F.2d 697 (1st Cir. 1980) 10

Winton v. Amos, 255 U.S. 373 (1921)..... 8

Woe v. Nebraska State Department of Public Welfare, 608 F.2d 302 (8th Cir. 1979) 15

STATUTES AND RULES

Emergency School Aid Act of 1972, §718, 20 USC §1617 (1972) 13

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1927..... 16

42 U.S.C. §1983..... *passim*

42 U.S.C. §1988..... *passim*

Rule 14, Eighth Circuit Court of Appeals..... 11

Rule 21.1(a), Rules of the Supreme Court..... 6

Rule 39, Federal Rules of Appellate Procedure 4, 15, 16, 17

Rule 52, Federal Rules of Civil Procedure 8

OTHER MATERIALS

ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS (1977) . 11

S. Rep. No. 94-1011. 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908 ..... 12, 16, 17

No. 79-1618

IN THE

Supreme Court of the United States

October Term, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

Petitioner, Consolidated Freightways Corporation of Delaware [CF],[1] seeks review of an order of the Eighth Circuit denying attorneys' fees under 42 U.S.C. §1988. The order reads in its entirety as follows:

> "Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants.

[1]Consolidated Freightways Corporation of Delaware is a wholly owned subsidiary of Consolidated Freightways, Inc. Both Companies wholly own all of their subsidiaries, except for United Terminals, Ltd., which is 50% owned by NLI Corporation, a subsidiary of Time-D.C., Inc.

> Costs are collectible in the United States District Court for the Southern District of Iowa.
>
> It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied." (A. 24)

Petitioner timely filed a motion to vacate the order (A. 25). The Eighth Circuit order disposing of that motion reads in its entirety as follows:

> "The Court has considered appellee's [CF's] motion to vacate its order of January 16, 1980, and response thereto. It is now hereby ordered that appellee's motion be, and is hereby, denied." (A. 29)

No order or opinion has been rendered by the District Court on attorneys' fees. The Eighth Circuit was the first court to act on any claim for attorneys' fees. Before trial, the District Court had separated all claims related to attorneys' fees from the case-in-chief which came before the Eighth Circuit on appeal.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered January 16, 1980. Petition for Certiorari was filed on April 15, 1980, and was granted on April 6, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983 Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution . . . shall be

liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

§1988 Proceedings in Vindication of Civil Rights.

". . . In any action or proceeding to enforce a provision of section[s] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

STATEMENT OF CASE

The State of Iowa prohibited the operation of 65' twin trailers through Iowa but permitted their operation in, to, and from certain border cities. Consequently, interstate general commodity carriers were forced to divert 65' twin trailers from direct interstate routes through Iowa to routes around Iowa. In 1978, Consolidated Freightways Corporation filed suit in District Court against State officials responsible for enforcing the law, alleging that enforcement of the law was a violation of the Commerce Clause, the Fourteenth Amendment, and 42 U.S.C. §1983 (A. 6-13). CF sought a declaratory judgment, injunctive relief, and attorneys' fees. The District Court bifurcated trial, separating the issue of attorneys' fees. It has yet to rule on the question of attorneys' fees for the trial (A. 18).

After an extensive trial of the case in chief, the District Court ruled for CF, declaring the statute to be unconstitutional and enjoining its enforcement. The Eighth Circuit Court of Appeals affirmed the District Court,[2]

[2] *Consolidated Freightways v. Kassel*, 612 F.2d 1064 (8th Cir. 1979).

and this Court recently affirmed that decision.[3] Subsequent to the Eighth Circuit decision, Plaintiff submitted a Bill of Costs pursuant to Rule 39 and the instruction of the Clerk of the Eighth Circuit (A. 20-21). Included in the costs were the attorneys' fees associated with the appeal. A letter accompanying the Bill of Costs drew the Court's attention to the District Court's bifurcation of the attorneys' fee issue, noted that only those attorneys' fees associated with the appeal were included in the Bill of Costs,[4] and suggested that judicial economy would be served by remanding the attorneys' fee question to the trial court to be considered jointly with fees for the trial (A. 19).

Costs of $131.40 were granted by the Eighth Circuit, but attorneys' fees and associated disbursements were denied without explanation (A. 24). Plaintiff filed a Motion to Vacate the denial order and to remand the issue to the trial court or, in the alternative, to permit filing of briefs and affidavits (A. 25). The Motion to Vacate was denied, again without explanation (A. 29).

SUMMARY OF ARGUMENT

The question upon which a writ of certiorari was granted and the only question susceptible of review is whether the Court of Appeals must provide a statement of

---

[3] *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328, (1981).

[4] Rule 39, Federal Rules of Appellate Procedure requires that costs be filed within 14 days after entry of judgment to avoid waiver. 42 U.S.C. §1988 provides that reasonable attorneys' fees may be awarded "as a part of the costs."

its reasons for making an initial decision denying attorneys' fees under 42 U.S.C. §1988. Not all cases require statements of reasoning. This case does. The lack of a statement impairs this Court's ability to review the decision, deprives the litigants of basic fairness, and impairs judicial efficiency.

Statements of the reasons for decisions granting or denying attorneys' fees under the civil rights laws have been uniformly required of trial courts by the Courts of Appeals and by this Court when a Court of Appeals makes the initial determination.

The appropriate relief is remand to the Eighth Circuit with instructions to remand to the District Court for an initial determination of attorneys' fees at trial and on appeal. Absent special circumstances, the trial court is better able to make initial determinations regarding attorneys' fees, and review of that decision by an intermediate appellate court will protect this Court's docket.

ARGUMENT

I. *THE SOLE ISSUE BEFORE THE COURT IS WHETHER THE LOWER COURT MUST STATE ITS REASONING.*

This Court did not grant certiorari on the issue of whether the court below erred by denying attorneys' fees. The only issue before the Court is whether the court below erred by not stating the reasons for its decision on

attorneys' fees.[5] Without such a statement of reasons, review of this decision is impossible, and the very impracticality of review becomes the issue on appeal.[6]

The posture of this case requires this narrow limitation of the issue, even though there are a number of possible underlying issues of importance. This case is not before the Court in the normal sequence of events. There has been no hearing on the issue of attorneys' fees. There has been no opportunity for either party to introduce evidence on attorneys' fees. There has been no substantial briefing of the issues, and there have been no stated determinations of fact or law by any court.

The Circuit Court's denial of attorneys' fees gives no hint as to the reasons for denial. It is impossible to determine what issues are involved in that denial and what issues should be appealed. Petitioner can hypothesize at least ten possible grounds for the denial, any of which could have been expressed in a one paragraph opinion:

1. The issue of attorneys' fees on appeal should not have been presented to the Court of Appeals but should have been presented in the first instance to the District Court.

---

[5]Rule 21.1(a) of this Court confines the parties to this issue, as it is the question upon which certiorari was granted. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-178 (1938); *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 357, n. 2 (1940); *Irvine v. California*, 347 U.S. 128, 129 (1954); *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429 (1964); and *Mayor v. Educational Equality League*, 415 U.S. 605, 623 (1974).

[6]We do not suggest that all cases require opinions, nor that any opinion required need be more than a sentence or two. We do contend that this case requires some statement of the Court's reasoning.

2. The Bill of Costs is an inappropriate vehicle to present attorneys' fees for consideration.

3. The Court of Appeals is without the trial court's power to award attorneys' fees under 42 U.S.C. §1988.

4. There is insufficient factual support for an award of attorneys' fees.

5. The fee request is excessive and is denied to discourage such claims.

6. The State and its officials are immune from awards of attorneys' fees.

7. 42 U.S.C. §1988 is inapplicable to cases involving property or commercial interests.

8. 42 U.S.C. §§1983 and 1988 are applicable, but there are special factual circumstances which would make an award of attorneys' fees unjust.

9. There are no constitutional rights cognizable under 42 U.S.C. §§1983 and 1988 in this case.

10. 42 U.S.C. §1988 requires a specific finding of discrimination.

There is case law opposing most of these grounds, but some are of first impression. The impossibility of treating all conceivable grounds for denial on appeal necessarily confines the issue to the question of whether the Court of Appeals should have stated the grounds for its decision.

II. *THIS COURT MUST REMAND TO PROTECT ITS POWER TO REVIEW.*

A. *The Power To Require An Opinion Is Inherent In The Power To Review.*

Even where no statute or rule requires an opinion, this Court has repeatedly reversed or vacated inadequately explained decisions it could not properly review.[7] The authority to do so is implied by the constitutional and statutory grants of reviewing authority, the inherent power to protect that authority from impairment, and the obligation to be fair to the litigants.

B. *The Power To Review Is Impaired By The Lower Court's Failure To State Reasons.*

Reviewing courts do not judge the evidence and decide cases. They review the decision below to determine that it was properly reached. To do that, they must know what the reasoning process of the lower court was, for the process and not the result frequently determines whether a case is affirmed or reversed. A decision which rests upon a close factual determination and proper application of the law should be affirmed. The same decision, if based upon a different factual conclusion and a misapplication

---

[7]Rule 52 of the Federal Rules of Civil Procedure requires findings of fact and conclusions of law by federal trial courts in most instances. This court has required such findings prior to enactment of the rule, *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, 69-71 (1933); *Panama Mail Steamship Co. v. Vargas*, 281 U.S. 670, 671-672 (1930); *Winton v. Amos*, 255 U.S. 373, 396 (1921); and has required them of state courts not bound by the rules, *Blackburn v. Alabama*, 354 U.S. 393, 393 (1957); *Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940); *Honeyman v. Hanan*, 300 U.S. 14, 26 (1937); and of the Circuit Courts of Appeals to whom rule 52 is inapplicable, *Northcross v. Board of Education*, 412 U.S. 427, 428-429 (1973); *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972).

of the law, should be reversed. Denial of access to the reasoning denies the power to review.

This case lacks any indication of the reasoning in the decision itself. It also lacks the circumstantial indications of the reasoning that a hearing, briefs by the parties, or a lower court decision could provide.[8] The original decision was based solely on a simple bill of costs (A. pp. 20-21) and a stark statement that Appellees objected (A. pp. 22-24). There are no clues to the basis of the denial.[9]

Review is also impaired by the failure to define the issues. That lack of definition makes review an arduous proposition for the Court and the litigants. The number of possible issues in this case makes the presence of the problem clear.

In addition, lower courts have no guidance in new unsettled areas such as the issue of attorneys' fees raised in this case. Here the precedent would be of immediate value. The District Court still must try the issue of attorneys' fees for the trial work. The unexplained denial by the Circuit Court can provide it with no guidance. Instead,

---

[8]The parties did file briefs on the Motion to Vacate, but no briefs were filed prior to the original decision. The later filed briefs cannot provide guidance as to the basis of the original decision.

[9]The lack of briefs or argument is not unusual. Though the Eighth Circuit requires District Courts to fully explain their reasons, it simultaneously awards attorneys' fees on appeal apparently *sua sponte* and without discussion of its own reasoning. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. (1980); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. (1980); *Kimbrough v. Arkansas Activities Assoc.*, 574 F.2d 423 (8th Cir. (1978); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978); *Brown v. Bathke*, 566 F.2d 588 (8th Cir. 1977).

it merely adds a new issue to those that already exist — What is the meaning and effect of the Circuit Court decision?[10]

There is a final, more subtle effect upon the appellate process. In unsettled areas of law there is a delicate dialogue among the courts. This dialogue promotes both efficient judicial administration and consistent, effective development of the law. The lack of an opinion, however brief, deprives the judicial system of this necessary dialogue. Because the procedures surrounding attorneys' fees are particularly unsettled and involve divisions of effort between the appellate and district courts, that dialogue is of particular value here.[11]

C. *Failure To State Reasons Denies The Litigants Fairness.*

The Constitution may only grant litigants a limited right to appeal in civil cases, but it does guarantee them fundamental fairness in the conduct of such an appeal. Without a statement of reasons when significant issues are involved, a litigant is often unable to tell whether to proceed or not.[12]

---

[10]The denial may not even be intended to be determinative in regard to appellate fees. If denial by the Eighth Circuit were based upon the desirability of an initial determination by the trial court, the trial court should not only decide the question of fees for trial work but entertain and join the question of fees for appellate work.

[11]Simple questions of procedure are unsettled, such as which court should award appellate fees, compare, *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977) with *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978), and whether they are a necessary part of a final judgment, *compare*, *White v. New Hampshire Dept. of Employment Security*, 629 F.2d 697 (1st Cir. 1980) *with Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

[12]"Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court." *Virginia Railroad Company v. U.S.*, 272 U.S. 660, 675 (1926).

If a losing party does appeal a multiple issue case without an opinion, he must dissipate the force of his appeal in a welter of possible legal issues and undetermined factual controversies. The reviewing court must base initial factual determinations on the paper record, depriving the litigants of the right to a live trial at which the credibility of the witnesses, an often decisive factor, may be judged. The appellee may be denied the proper advantage that factual determinations by the trial court in his favor would give him on appeal.

III. *THE COURTS HAVE HELD THAT ATTORNEYS' FEE DECISIONS REQUIRE A STATEMENT OF REASONS.*

A. Review Of Attorneys' Fee Awards Requires A Statement Of Reasons.

Not all appellate decisions require even abbreviated statements of reasons. A comprehensive definition of which decisions require articulation of the court's reasoning would be difficult, but need not be made in this case.[13] Decisions regarding attorneys' fees under the civil rights

---

[13]The American Bar Association Task Force on Appellate Procedure has recommended:

"The question of whether the opinion should be published or not published is quite separate from the question of whether there shall be any opinion at all. The device of eliminating opinions entirely by what are in effect one word orders of the 'affirmed' or 'reversed' variety exists in some jurisdictions. Except for the simplest cases, this is not desirable; particularly in cases of a reversal there ought to be explanation which demonstrates that the law is a reasoned process." ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS, (1977), p. 115.

The Eighth Circuit provides by rule for affirmance without opinion of lower court decisions but requires citation to the rule which lists reasons for the affirmance, 8th Cir. R. 14.

laws clearly fall within the class of decisions requiring a statement of reasons.

In *Newman v. Piggie Park Enterprise, Inc.*, 390 U.S. 400 (1968), this Court held that attorneys' fees should be awarded under the Civil Rights Act of 1964, absent special circumstances. In enacting 42 U.S.C. §1988, Congress specifically intended that the *Newman* standard be applied to 42 U.S.C. §1988.

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278 [enacted 42 U.S.C. §1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912.

The statute thus grants discretion to the trial court as to whether fees should be awarded, but also provides a rigorous standard for the exercise of that discretion. Fees may only be denied if there are "special circumstances." The combination of discretion and a standard for the exercise of that discretion necessitates a statement of reasons to determine whether the decision is proper.

The Circuit Courts of Appeals have held that decisions on attorneys' fees under the civil rights laws, whether granted or denied, must be accompanied by a statement of reasons. *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *McGowan v. King, Inc.*, 616 F.2d 745, 747 (5th Cir. 1980); *International Society for Krishna Consciousness, Inc. v. Anderson*, 569 F.2d 1027, 1029 (8th Cir. 1978); *Fountila v. Carter*, 571 F.2d 487, 496-497 (9th

Cir. 1978); *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 371 (9th Cir. 1981). The Eighth Circuit itself has so held:

> "We are unable to determine from the District Court's order whether the court's denial of attorneys' fees was based on an erroneous belief that the Act [42 USC §1988] did not authorize an award of fees in this case, or whether it was an exercise of its discretionary power under the Act. We, therefore, reverse and remand the cause to the District Court . . ." *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 427 (1978).

B. *This Court Has Held That A Court Of Appeals Must State The Reasons For Denial Of Attorneys' Fees.*

The precedent of this Court is consistent with the holdings of the Courts of Appeals. In *Northcross v. Board of Education*, 412 U.S. 427 (1973), a case identical in posture to this one,[14] the Court vacated a Circuit Court of Appeals decision on attorneys' fees and remanded the case for a statement of reasons;

> "In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of costs and attorneys' fees. The Court of Appeals did not, however, state reasons for the denial and it is therefore not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result.
>
> • • •
>
> Since it is impossible for us to determine whether the Court of Appeals applied the standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment

[14]The request for fees on appeal in *Northcross* was originally made to the appellate court pursuant to the Emergency School Aid Act of 1972, §718, a statute *in pari materia* with 42 U.S.C. §1983.

below insofar as it relates to the denial of costs and attorneys' fees, and remand to the Court of Appeals for further proceedings consistent with this opinion." *Northcross v. Board of Education*, 412 U.S. at 427-429 (1973) (Footnotes omitted).

VI. *Remand To The Circuit Court With Instruction To Remand To The District Court Is The Appropriate Relief.*

A. *The District Court Is Better Able Than The Appellate Court To Determine Attorneys' Fees.*

Normally the trial court can better determine attorneys' fees awards than the Circuit Court of Appeals, even when the fees include a determination of appellate fees. The trial court generally has better knowledge of the details of the case, will be better aware of the tactical decisions made and the need for them, and be more familiar with the efforts of counsel. Remand to the trial court will often permit consolidating the attorneys' fees for all phases of the case in one hearing and decision.

Initial determination by the trial court also allows appellate review prior to review by this Court.[15]

An appellate court is procedurally ill-suited to determine the facts necessary in fee awards. In *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970), this Court held that attorneys' fees on appeal in antitrust cases should normally be first determined by the trial court. All of the circuits, save for the Eighth Circuit, have generally adopted that position for civil rights attorneys' fee

[15]Routine awards of attorneys' fees by the Courts of Appeals would substantially increase the docket of this Court which would be the only available court of review. The volume of such cases and the responsibilities of this Court would prevent any review of many erroneous decisions.

awards for appeal of civil rights cases.[16] The Eighth Circuit has not.[17]

B. *Congress Did Not Intend The Courts Of Appeals To Initially Determine Attorneys' Fee Awards.*

It would be inappropriate to remand to the District Court if Congress had intended that attorneys' fees on appeal be decided initially by the Courts of Appeals. 42 U.S.C. §1988 provides that fees shall be awarded "as costs." Federal Rules of Appellate Procedure Rule 39(b) requires submission of a bill of costs to the Court of Appeals within 14 days of judgment. Read together, the

---

[16]First Circuit: *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977). Second Circuit: *Mid-Hudson Legal Services, Inc. v. G&U, Inc.*, 578 F.2d 34 (2d Cir. 1978), *on remand*, 465 F. Supp. 261 (S.D. N.Y. 1978); *Fitzpatrick v. Bitzer*, 455 F. Supp. 1338 (D. Conn. 1978), *on remand from* 427 U.S. 445 (1976). Third Circuit: *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978). Fourth Circuit: *McManama v. Lukhard*, 616 F.2d 727 (4th Cir. 1980). Fifth Circuit: *Aware Woman Clinic, Inc. v. City of Cocoa Beach*, 629 F.2d 1146 (5th Cir. 1980); *Iranian Students Assoc. v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Gary W. v.State of Louisiana*, 622 F.2d 804 (5th Cir. 1980); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980); *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979). Sixth Circuit: *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). Seventh Circuit: *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3617 (U.S. 2/24/81) (No. 80-1039); *Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980), *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979). Ninth Circuit: *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978). Tenth Circuit: *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980); *Love v. Mayor of Cheyenne*, 620 F.2d 235 (10th Cir. 1980); *Booker v. Brown*, 619 F.2d 57 (10th Cir. 1980). District of Columbia Circuit: *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977), *on remand*, 443 F. Supp. 789 (D.D.C. 1978).

[17]*Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980), *cert. denied*, 101 S.C. 88 (1980); *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726 (8th Cir. 1979); *Woe v. Nebraska State Department of Public Welfare*, 608 F.2d 302 (8th Cir. 1979); *Brown v. Bathke*, 566 F.2d 588 (8th Cir. 1977); *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978).

two could imply that attorneys' fees on appeal must be submitted initially to the Court of Appeals and an inference be drawn that Congress intended that the Court of Appeals initially determine appellate fees. Stated more generally, the question is whether Congress intended to embrace all of the rules, statutes, and case law developed on costs by using the phrase "as costs" in regard to attorneys' fees awards.

This Court has recently determined that Congress did not intend in 42 U.S.C. §1988 to incorporate other statutes regarding costs. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). In *Roadway*, the Court determined that 28 U.S.C. §1927 (providing awards of costs in certain cases) was not applicable to attorneys' fees under 42 U.S.C. §1988.

A close review of Rule 39 shows its provisions to be inconsistent with the congressional purpose of 42 U.S.C. §1988, thus strongly suggesting that Congress did not intend Rule 39 to be applicable to attorneys' fees under 42 U.S.C. §1988. Rule 39(a), for instance, contemplates equal treatment of taxation of the parties. Though §1988 does not on its face so provide, congressional history suggests different treatment of plaintiffs and defendants. S. Rep. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5908, 5912. Rule 39(d) as it existed at the time of enactment of 42 U.S.C. §1988 provided for the taxation of the costs by the clerk. The 1979 amendment provided for objections to the Bill of Costs, but clearly contemplates as the norm a clerical matter involving no discretion. An award of attorneys' fees to the contrary will always require sub-

stantial exercise of judicial discretion. Moreover, if attorneys' fees under §1988 are to be regarded literally "as costs" for purposes of Rule 39, those attorneys' fees associated with the preparation of the record must be awarded by the trial court, Rule 39(e). Finally, Rule 39 only provides for awards after judgment, whereas Congress intended to permit awards *pendente lite* under 42 U.S.C. §1988, S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5908, 5912.

The inconsistencies between Rule 39 and 42 U.S.C. §1988 strongly suggest that Congress did not intend Rule 39 to apply to §1988. Application of Rule 39 to §1988 is the only support that exists for inferring a congressional intent that the Circuit Court of Appeals initially determine attorneys' fees. Without it, judicial efficiency strongly supports an initial determination by the trial court in most cases, and certainly in this bifurcated action.

CONCLUSION

There may well be issues of substantial importance in this case, but the present posture only presents the single issue of whether the denial of attorneys' fees must have its reasoning stated. Remand will permit the other issues to be raised and argued by the parties and decided, not in the abstract, but in the context of the operative determined facts of an actual case. Remand will permit informed review of the issues.

Remand to the District Court will promote judicial efficiency. It will avoid the separate consideration by different courts of attorneys' fees for trial and attorneys' fees on appeal that wastes judicial time and invites the

mischief of contradictory decisions. It will discourage the practice of Courts of Appeals making initial decisions of attorneys' fees, a practice that inappropriately makes this Court a court of initial appeal.

Dated June 18, 1981.

Respectully submitted,

JOHN H. LEDERER
JOHN DUNCAN VARDA
ANTHONY R. VARDA

DeWITT, SUNDBY,
HUGGETT & SCHUMACHER, S.C.

Post Office Address:
121 South Pinckney Street
P. O. Box 2509
Madison, Wisconsin 53701
Telephone: (608) 255-8891